STATE OF INDIANA	)	IN THE MARION CIRCUIT COURT
	) SS:	
COUNTY OF MARION	)	CAUSE NO. 49C01-1501-PL-3142

A. KATHERINE TOOMEY)
)
Plaintiff,)
)
v.)
)
INDIANA DEPARTMENT OF CORRECTION)
)
Defendant.)

ORDER DENYING THE DEPARTMENT OF CORRECTION'S MOTION TO MODIFY SUMMARY JUDGMENT ORDER

This matter is before the Court on the "Motion to Modify Order on Summary Judgment and to Grant Summary Judgment to DOC" filed by the Defendant, the Indiana Department of Correction ("The Department") on June 16, 2017 after the Court entered summary judgment on October 24, 2016 in Plaintiff A. Katherine Toomey's favor. The Court, having read the parties' pleadings and having heard oral argument on September 20, 2018 now issues the following order:

PROCEDURAL HISTORY

1. On January 30, 2015, Toomey filed suit, generally alleging that the Department refused to provide her public records containing basic information regarding the drugs it maintains to carry out executions by lethal injection. A week later, she filed an amended complaint. The Department filed its answer on July 1, 2015. On April 18, 2016, Toomey sought summary judgment. On June 6, 2016, the Department filed its cross-motion for summary judgment. The Court held a hearing on August 4, 2016, and on October 24, 2016, it entered summary judgment for Toomey and against the Department, leaving only

the question of Toomey's attorney fees as provided in the Access to Public Records Act (APRA), Ind. Code § 5-14-3-9(i).

2. The Order required the Department to "provide to the plaintiff all public records in its possession, including 'product packaging' that identify the manufacturers and vendors of pharmaceuticals used in the lethal injection process within 30 days of this order." The Court scheduled a hearing on fees for December 6, 2016.
3. On November 22, 2016, the Department filed a notice of appeal and asked the Court to stay execution of judgment without bond. It did not seek certification of the judgment as final under Ind. Trial Rule 54(B) or seek a discretionary interlocutory appeal under Appellate Rule 14(B).
4. On December 1, 2016, the Court granted the stay while the appeal was pending "or the Indiana Court of Appeals dismiss[es] the appeal for lack of a final judgment." On January 6, 2017, the Court of Appeals dismissed the appeal. On April 27, 2017, the Supreme Court denied the Department's petition seeking transfer of the dismissal.
5. On May 4, 2017, Toomey asked this Court to schedule the hearing on attorney fees as provided by APRA. The next day the Department objected, pointing to a newly enacted Statute at Ind. Code § 35-38-6-1(e)-(f) ("Statute").
6. On June 16, 2017, the Department filed a motion to modify the October 2016 judgment in light of the Statute's provisions. The parties thereafter engaged in discovery. On February 22, 2018, Toomey filed her response, accompanied by documents she had obtained during discovery under a confidentiality agreement.
7. On May 14, the Department filed its reply. The next day the Court held a hearing on whether the documents submitted with Toomey's response should be publicly accessible.

8. On July 12, 2018, the Court issued its ruling that the unredacted documents should remain under seal. On September 20, 2018, the parties appeared by counsel for a hearing on the Department's motion to modify the summary judgment Order.

FACTUAL BACKGROUND

9. On May 29, 2014, Toomey requested under APRA that the Department provide public records in its possession concerning drugs that the Department had purchased, maintained, intended, or considered for use in carrying out executions. *See* Ind. Code §§ 5-14-3-1-1 to -10 (APRA). Toomey requested the following records:

> 1. The supplies (including the number, size and concentration of vials) of any and all drug intended or considered for use in executions currently in the possession of the IDOC.
>
> 2. The expiration date of any and all drugs intended or considered for use in executions currently in the possession of the IDOC.
>
> 3. The lot numbers of any and all drugs intended or considered for use in executions currently in the possession of the IDOC.
>
> 4. Inventory logs or chain-of-custody documents for any and all drugs intended or considered for use in executions currently in the possession of the IDOC.
>
> 5. Any and all activity by the Indiana DOC from January 1, 2012 to the present to purchase or acquire any drugs for use in past or future executions, including purchase orders, invoices, checks, money orders, receipts, memoranda, and correspondence.
>
> 6. Documents regarding the manufacturers and/or distributors of any and all drugs intended or considered for use in executions from January 1, 2012 to the present.
>
> 7. Any correspondence between the Indiana DOC and any party, including other state DOCs, hospitals, pharmacies, and state

> and federal agencies, from January 1, 2012 to the present regarding drugs intended or considered for use of executions.
>
> 8. Any correspondence between the Indiana DOC and any party from January 1, 2012 to the present regarding execution protocols, regulations, guidelines, checklists, notes, or other documents that instruct or direct the carrying out of an execution.

10. The Department refused to produce any documents. As it later did in this Court, the Department first claimed that product packaging is not a public record under APRA. Second, it asserted that Ind. Code § 35-38-6-6 exempted documents that would identify persons who assisted in an execution. Third, it argued that 210 Ind. Admin. Code 1-6-2(3)(C) exempted documents because the information might result in physical harm to another person. Fourth, it contended that Ind. Code § 5-14-3-4(b)(8) exempted certain records because they would jeopardize a security system.
11. On July 18, 2014, Toomey filed a formal complaint with the Office of the Public Access Counselor challenging the Department's refusal to provide any documents. After receiving a copy of the complaint, the Department produced some responsive documents. The produced documents responded to Ms. Toomey's request 8 above.
12. On August 19, 2014, the Public Access Counselor rejected every one of the Department's grounds for withholding information, concluding the Department had violated APRA. On August 27, Toomey wrote the Department, asking the Department to produce the rest of the documents and pointing out that the produced correspondence was incomplete, including cut-off e-mails and missing attachments. The Department never responded.

13. In October 2015 the Department produced a second limited set of documents. This set included documents the Department characterized as "purchase orders" and invoices for execution drugs and a facility directive for the carrying out of death sentences.
14. After the 30(B)(6) deposition, the Department produced a fourth set of documents. This set included two logs, one for items held for executions and one for items held for training. Counsel's cover letter stated, "I believe the Department of Correction has produced all documents that are responsive to Ms. Toomey's request, either in redacted form or with the exception of the product packaging." The Department continues to withhold, at a minimum, records identifying the manufacturers and vendors of the drugs it uses in executions and the labels on the vials containing those drugs.
15. In April 2016 Ms. Toomey sought summary judgment. On June 23, 2016, the Department's Director of Legislative Services sent an e-mail to the Governor's Policy Director for Public Safety attaching a document titled "2017 Legislative Ideas." Among the ideas presented to the Governor was a proposed bill that would become the Statute.
16. On October 24, 2016, the Court issued an order granting Toomey's Motion for Summary Judgment and denying the Department's Cross-Motion for Summary Judgment. The Court concluded, among other things, that the Department was required to provide Toomey with documents identifying the manufacturers and vendors of the drugs that the Department uses in executions.
17. On April 18, 2017, the Department's deputy commissioner e-mailed the Governor's legislative chief, saying, "[Name redacted] – I spoke with [name of Department's legislative services director redacted] about this. I believe these [sic] version is

substantially similar to the earlier draft, and should be helpful in resolving the Toomey case, and serve the other purposes. I have no revcommendations [sic] to make to it."

18. The language sent to the Governor's office found its way into a bill in the early hours of April 21, the last day of the 2017 session. The conference committee, without public hearing or notice, added the language in the final version of House Bill 1001, now Public Law 217-2017. That bill was the biennial budget. It was titled "An Act to amend the Indiana Code concerning state offices and administration and to make an appropriation."
19. On April 21, 2017, at approximately 2:00 a.m., an amendment was posted to House Bill 1001, which added Section 161 to the bill.
20. Section 158 of the Budget Bill added two subsections to the chapter on execution of death sentence in the Indiana Code:

> (e) The department of correction may make and enter into a contract with an outsourcing facility, a wholesale drug distributor (as defined in IC 25-26-14-12), a pharmacy (as defined in IC 25-26-13-2), or a pharmacist (as defined in IC 25-26-13-2) for the issuance or compounding of a lethal substance necessary to carry out an execution by lethal injection.
>
> A lethal substance provided to the department of correction under this subsection may be used only for the purpose of carrying out an execution by lethal injection …
>
> A pharmacist, a pharmacy, a wholesale drug distributor, or an outsourcing facility that provides a lethal substance to the department of correction under this subsection shall label the

lethal substance with the name of the lethal substance, its dosage, a projected expiration date, and a statement that the lethal substance shall be used only by the department of correction for the purpose of carrying out an execution by lethal injection.

(f) The following are confidential, are not subject to discovery, and may not be introduced as evidence in any civil or criminal proceeding:

(1) The identity of a person described in subsection (e) that enters into a contract with the department of correction under subsection (e) for the issuance or compounding of lethal substances necessary to carry out an execution by lethal injection.

(2) The identity of an officer, an employee, or a contractor of a person described in subdivision (1).

(3) The identity of a person contracted by a person described in subdivision (1) to obtain equipment or a substance to facilitate the compounding of a lethal substance described in subsection (e) …

This subsection applies retroactively to any request for information, discovery request, or proceeding, no matter when made or initiated. Ind. Code § 35-38-6-1(e)-(f). These subsections constitute the Statute.

21. The Department filed its Motion to Modify the Summary Judgment Order on June 16, 2017, arguing that Indiana Code section 35-38-6-1, as amended and retroactively applied, designates as confidential the information sought by Toomey in the Complaint. The Department further argued that because the law had been changed since the Court issued its summary judgment in a manner that affects the substance of the order, that order should be modified to comply with the current law concerning the confidentiality of execution drug suppliers and manufacturers.

22. On February 22, 2018, Toomey filed her Response Opposing the Department's Motion to Modify the Judgment, in which she (1) raised four constitutional challenges to the Statute, (2) argued that the items sought in the Complaint were not covered by the Statute, and (3) argued that modification of the summary judgment order was not proper under the Indiana Trial Rules.

23. The Department filed a Reply Brief in support of its Motion to Modify on May 14, 2018, addressing each of the challenges raised in Toomey's response. The Court heard oral argument from both parties on September 20, 2018. This matter is now ripe for ruling.

STANDARD OF REVIEW

24. The Department bears the burden to show that summary judgment in Toomey's favor should be revised. Trial Rule 60(B) provides the criteria. Here, the relevant subsections are Rule 60(B)(7) and 60(B)(8). Trial Rule 60(B)(7) holds the court may relieve a party

from a judgment if "the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application." Trial Rule 60(B)(8), allows for relief for "any reason justifying relief from the operation of the judgment…"

25. Subsection (8) "should be liberally construed to allow courts to vacate a judgment within the residual power of a court of equity to do justice." *Sheraton Corp. of Am. v. Korte Paper Co.*, 363 N.E.2d 1263, 1265 (Ind. Ct. App. 1977).
26. The party seeking relief under Trial Rule 60(B)(8) "must show that its failure to act was not merely due to an omission involving the mistake, surprise, or excusable neglect. Rather some extraordinary circumstances must be demonstrated affirmatively. This circumstance must be other than those circumstances enumerated in the preceding subsections of T.R. 60(B)." *Brimhall v. Brewster,* 864 N.E.2d 1148, 1153 (Ind. Ct. App. 2007).
27. To claim relief under Rule 60(B)(7), "there must be a showing that there has been some change of circumstance since the entry of the original judgment, and that the change of circumstance was not reasonably foreseeable at the time of the entry of judgment." *Warner v. Young Am. Volunteer Fire Dep't,* 326 N.E.2d 831, 837 (Ind. Ct. App. 1975).

DISCUSSION

Trial Rule 60(B) and Trial Rule 54(B)

28. The Department asks the Court to modify its judgment under Trial Rule 60(B). Specifically, it points to Rule 60(B)(7), arguing that the judgment's prospective

application "is no longer equitable." It also relies on Rule 60(B)(8), which allows relief for "any reason justifying relief from the operation of the judgment" other than those reasons listed in subsections (1)–(7). Under both subsections, it claims that the passage of the statute, in and of itself, is sufficient reason to justify modification.

29. Rule 60(B) "affords relief in extraordinary circumstances which are not the result of any fault or negligence on the part of the movant." *Smith v. State*, 38 N.E. 3d 218, 220 (Ind. Ct. App. 2015) (quoting *Dillard v. Dillard*, 899 N.E.2d 28, 34 (Ind. Ct. App. 2008)). A grant of equitable relief is within the discretion of the trial court. *State Farm Fire & Cas. Co. v. Radcliff*, 18 N.E.3d 1006, 1011 (Ind. Ct. App. 2014). "In reviewing a T.R. 60(B) motion, 'the trial court must weigh the alleged inequity that would result from allowing a judgment to stand against the interest of the prevailing party in its judgment, as well as those of society at large in the finality of litigation in general.'" *Id*. (quoting *Dumont v. Davis*, 992 N.E.2d 795, 805 (Ind. Ct. App. 2013)).

30. The Department maintains Rules 54(B) and 60(B) provide alternative paths to a party seeking to modify a non-final order. The Department points to *Celadon Trucking Services, Inc. v. United Equipment Leasing, LLC*, 10 N.E.3d 91, 95 (Ind. Ct. App. 2014), for the principle that non-final orders can be modified under Trial Rule 54(B) or 60(B). Although *Celadon* rejects relying on Trial Rule 54 except after a final judgment, it does not make the same conclusion about Trial Rule 60(B). The *Celadon* court also did not address Toomey's position that Rule 60(B) provides the criteria for whether to modify any judgment, final or not.

31. As Toomey suggests, allowing a party to choose between Rule 54(B) or 60(B) would allow the former to subsume the latter. Rule 54(B) does not provide criteria by which a

court should evaluate a motion to revise a judgment. It merely provides *when* a court may revise a non-final judgment: "any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

32. Rule 60(B) applies to any *judgment*, final or not. Unlike Rule 54(B), however, Rule 60(B) contains specific criteria for courts to consider in revisiting a judgment.

33. Rule 60(B)(7) permits a party to obtain relief from (1) a judgment that has been satisfied, released or discharged, (2) a prior judgment, upon which the present judgment is based, has been reversed or vacated on appeal, or (3) the judgment in equity should no longer receive prospective application. "A judgment has prospective application within the meaning of Rule 60(B)(7) when a person's right to do or not to do some act is continuously affected by the operation of the judgment in the future; or, the judgment is specifically directed toward some event which is to take place in the future and does not simply serve to remedy past wrongs." *State v. Martinsville Development Co., Inc.*, 366 N.E.2d 681, 685 (Ind. Ct. App. 1977). *See also,* Harvey, Rules of Procedure Annotated § 60.10 (3d ed.).

34. Indiana courts have granted relief under Rule 60(B)(7) where the judgment imposed an ongoing obligation. *See, e.g., Indiana Family & Soc. Servs. Crafton v. Gibson*, 752 N.E.2d 78 (Ind. Ct. App. 2001); *Admin. v. Hosp. House of Bedford*, 704 N.E.2d 1050, 1062 (Ind. Ct. App. 1998).

35. The judgment at issue here is *not* prospective. It commands the Department to act, but that obligation does not continue into the future beyond its direction to "provide to the plaintiff all public records in [the Department's] possession, including 'product packaging' that identify the manufacturers and vendors of pharmaceuticals used in the

lethal injection process within 30 days of this order." The judgment does not impose any ongoing obligation. The judgment is therefore not prospective and not one that may support relief under Rule 60(B)(7).

36. The Department asserts that if Rule 60(B)(7) doesn't apply, then it is entitled to relief under Rule 60(B)(8), which allows relief for "any reason justifying relief from the operation of the judgment, other than those reasons set forth in sub-paragraphs (1), (2), (3), and (4)."

37. The provision may be invoked only on a showing of "exceptional circumstances justifying extraordinary relief." *Weinreb v. TR Developers, LLC*, 943 N.E.2d 856, 867 (Ind. Ct. App. 2011) (denying a Rule 60(B)(8) motion brought under a claim of newly discovered forgery where movant did not demonstrate due diligence).

38. Examples of exceptional circumstances where relief was granted include issues in service of process and inequities between a contract amount and a damages award. *See Fitzgerald v. Brown*, 344 N.E.2d 309 (1976) (relief from default judgment granted where defendant testified that he did not receive service and did not have actual knowledge of the proceedings prior to the entry of default judgment), *Stewart v. Hicks*, 395 N.E.2d 308 (1979) (damage portion of final default judgment set aside where there was no hearing on the issue of damages, judgment was for $50,000, and the matter in issue only involved a contract for sale of a license for approximately $12,000). A change in the law is not grounds for relief under this rule.

39. The Department asserts that Rule 60(B)(8) should be available if the Court concludes that no other subsection would grant relief. But Indiana cases have held that Rule 60(B)(8) is unavailable if the grounds for modification would fit another subsection enumerated in

Rule 60(B). For example, in *Fish v. 2444 Acquisitions, LLC*, 46 N.E.3d 1261 (Ind. Ct. App. 2015), the movant sought modification of an agreed foreclosure judgment under Rules 60(B)(6) and 60(B)(3), but for various reasons was ineligible for relief under those subsections.

40. The movant argued that he should be eligible for relief under the "catch-all" provision of Rule 60(B)(8). But the court held that such relief was unavailable: "Subsection (8) is not available if the grounds for relief properly belong in another of the enumerated subdivision[s] of T.R. 60(B)." 46 N.E.3d at 1267. *See also Weppler v. Stansbury*, 694 N.E.2d 1173, 1176 (Ind. Ct. App. 1998) (relief under 60(B)(8) is unavailable if grounds for relief properly belong in another Rule 60(B) subdivision); *Summit Account & Computer Service v. Hogge*, 608 N.E.2d 1003 (Ind. Ct. App. 1993) (cannot circumvent conditions for 60(B)(1) relief by attempting to rely on Rule 60(B)(8)); *In re Marriage of Jones*, 389 N.E.2d 338, 340 (Ind. Ct. App. 1979) (motion to modify judgment on grounds that it was no longer equitable for judgment to have prospective application had to be sought under Rule 60(B)(7) and could not be sought in the alternative under Rule 60(B)(8)). Where another Rule 60(B) subsection applies but is not met, Rule 60(B)(8) does not provide relief.

41. Also, the Department fails to show unforeseen or extraordinary circumstances that would justify relief under either Rule 60(B)(7) or 60(B)(8). The evidence shows that the Department, since the middle of 2016, was contemplating and working toward the enactment of the Statute.

42. The fact that the Department's efforts were successful and the statute ultimately was enacted is not an unforeseen or extraordinary condition warranting modification in the Court's judgment. *See McIntyre v. Baker*, 703 N.E.2d 172 (Ind. Ct. App. 1998).

The "Contract" requirement contemplated by the Statute

43. The Statute does not protect the documents Toomey seeks because the Department has failed to show, as required under the Statute, that it has entered into any contract with an outsourcing facility, wholesale drug distributor, pharmacy, or pharmacist.

44. The Statute requires the Department to show that the information it seeks to withhold involves a person with whom it has a contract. The law specifies that confidentiality only applies if the Department has entered into a contract with (1) an outsourcing facility;[1] (2) a wholesale drug distributor;[2] (3) a pharmacy;[3] or (4) a pharmacist.[4] The documents submitted by the Department in Exhibits B and C to its reply do not provide any information about the party with which the Department contracted for drugs. The

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[1] *Outsourcing facility* is not defined in the Indiana Code. The Federal Food, Drug, and Cosmetic Act defines *outsourcing facility* as "a facility at one geographic location or address that (i) is engaged in the compounding of sterile drugs; (ii) has elected to register as an outsourcing facility; and (iii) complies with all of the requirements of this section." 21 U.S.C. § 353b(d)(4)(A).

[2] The Indiana Code defines *wholesale drug distributor* as "a person engaged in wholesale distribution of legend drugs, including: (1) manufacturers; (2) repackers; (3) own-label distributors; (4) private-label distributors; (5) jobbers; (6) brokers; (7) warehouses, including manufacturers' and distributors' warehouses, chain drug warehouses, and wholesale drug warehouses; (8) independent wholesale drug traders; (9) retail and hospital pharmacies that conduct wholesale distributions; and (10) reverse distributors. The term does not include a common carrier or person hired solely to transport prescription drugs." I.C. § 25-25-14-12.

[3] The Indiana Code defines *pharmacy* as "any facility, department, or other place where prescriptions are filled or compounded and are sold, dispensed, offered, or displayed for sale and which has as its principal purpose the dispensing of drug and health supplies intended for the general health, welfare, and safety of the public, without placing any other activity on a more important level than the practice of pharmacy." I.C. § 25-26-13-2.

[4] The Indiana Code defines *pharmacist* as a person licensed under the Indiana pharmacy statute. I.C. § 25-26-13-2.

Department provided no evidence—for example, an affidavit from anyone with knowledge regarding these documents—as to what the supposed contracts were for and whether any of the vendors (without giving away identities) qualified as persons subject to the Statute and that the vendors understood, as the statute requires, that drugs were being provided to carry out executions by lethal injection. As a result, the Department has not shown that any "contract" meets the Statute's requirements.

45. The Statute extends confidentiality protection only to entities that have entered into contracts with the Department "for the issuance or compounding of a lethal substance necessary to carry out an execution by lethal injection" and "only for the purpose of carrying out an execution by lethal injection." I.C. § 35-38-6-1(e). This requirement is implemented by mandating the purpose be included on the drug labels.

46. The Department has failed to show that any such contract exists, let alone for the purpose of carrying out an execution by lethal injection. The combination of "purchase orders" and invoices do not support the existence of a contract. The invoices are addressed to the Indiana State Prison. They do not show the purpose of the drugs, so the Court cannot determine whether any sale might fall under the Statute.

47. The Department has failed to prove the existence of any contract indicating an agreement to provide drugs for the purpose of carrying out an execution by lethal injection and subject to subsection (e) of the Statute. It has similarly failed to provide evidence that any drugs already supplied to the Department were accompanied by a statement noting that it "shall be used only by the department of correction for the purpose of carrying out an execution by lethal injection." I.C. § 35-38-6-1(e).

48. The Department argues that it is not necessary that the contract be in writing. As a general rule, contracts to which a state agency is a party are required to be in writing. Ind. Code § 4-13-2-14.2(a). However, a contract need not be in writing if the contract is created under one of three statutes. Ind. Code § 4-13-2-14.2(b). One of these three exceptions relates to "small purchases." This statute provides that if a purchasing agent expects a purchase to be less than $50,000, the "purchasing agent may make a purchase under small purchase policies established by the purchasing agency or under rules adopted by the government body." Ind. Code § 5-22-8-2. The purchase of lethal injection drugs by DOC is a "small purchase" because each transaction is under $50,000, and therefore not required to be in writing.
49. "However, the attorney general, in rules adopted under section 14.3 of this chapter, may require the state agency that is the party to the contract to maintain on file invoices, bills, or other writings that show the contract was performed and the amount of payment that is due." I.C. § 4-13-2-14.2(b).
50. The Department has had ample time over the course of this litigation to produce such documents to show the Court the existence and performance of a contract for and related to the purchase of drugs used in lethal injection practices.
51. The Department has failed to do this. However, if the Court's "Contract" findings fail, the Court relies on the following issues.

Constitutionality

Separation of Powers under Article 3, Section 1

52. Following the Court's Ruling on Motion for Summary Judgment and during the five months the Department's appeal was pending, the Department's Director of Legislative

Services e-mailed the Governor's Deputy Chief of Staff of Legislative Affairs. The e-mail attached the full text of the Secrecy Statute. On April 18, 2017, the Department's deputy commissioner e-mailed the Governor's legislative chief, saying, "[Name redacted] – I spoke with [name of Department's legislative services director redacted] about this. I believe these [sic] version is substantially similar to the earlier draft, and should be helpful in resolving the Toomey case, and serve the other purposes. I have no revcommendations [sic] to make to it."

53. In passing the Statute while Toomey's case was pending with the Indiana Court of Appeals and the Indiana Supreme Court, the General Assembly unconstitutionally took away the judicial power. The General Assembly does not have the authority to determine the outcome of pending litigation. As applied to this case, the General Assembly's passage of the Statute overstepped its authority and violated the Indiana Constitution's Separation of Powers by disturbing a pending case and upsetting this Court's judgment.

54. The separation of powers provision exists not only to protect the integrity of each branch of government, but also to permit each branch to serve as an effective check on the other two. *State of Indiana, et. al v. Robert V. Monfort*, Ind. 723 N.E.2d 407, 413. The Judicial function may not be controlled by the executive or the legislative branch, and the same barriers exist with reference to controlling discretionary actions of executive department and the legislative department. *Carlson v. State ex rel. Stodola,* 1966, 220 N.E.2d 532, 247 Ind. 631.

55. Toomey filed her initial records request under APRA and, ultimately, this lawsuit, long before the General Assembly passed the Statute. The General Assembly may not change the result of her litigation. While other requests may be precluded by the Statute,

blocking Toomey's request after this Court had already ordered the Department to produce the documents violates Article 3, Section 1 of Indiana's Constitution.

56. The Department asserts that the Statute does not violate separation of powers because the General Assembly changed the law before this Court entered a final judgment. It cites *State ex rel. Mass Transportation Authority of Greater Indianapolis v. Indiana Revenue Board*, 253 N.E.2d 725, 731 (Ind. Ct. App. 1969). But that decision does not authorize legislative interference in the exercise of judicial power as long as a case has not proceeded to a final judgment.

57. The Department has not provided any opinion that rejected a challenge based on separation of powers because the affected decision was not a final judgment. In fact, *Mass Transportation Authority* indicates that a judgment need not be appealable as of right to be off limits to the General Assembly's interference. The Appellate Court cited to *Logan v. Sult*, 152 Ind. 434, 438, 53 N.E. 456, 458, and *Rooker v. Fidelity Trust Co.*, 198 Ind. 207, 212, 151 N.E. 610, 612 (1926), to explain that even though auxiliary matters may remain and even though an order is not yet appealable, it should be considered final "for all purposes other than the right of appeal" and "may be enforced by appropriate writ according to its terms."

58. The Department also cites to *Lemmon v. Harris*, 949 N.E.2d 803, 814 (Ind. Ct. App. 2011). But *Lemmon* similarly falls short of supporting the principle the Department advances. Like *Mass Transportation Authority*, *Lemmon* involved a final judgment. 949 N.E.2d at 805. It could not and did not address the question of whether something less than an appealable final judgment constitutes the judicial department exercising its function making the decision off-limits to legislative interference.

59. Here, the judgment resolves all but the auxiliary question of attorney fees and was otherwise enforceable under its terms.

60. It was therefore well within the function of the judiciary and outside the General Assembly's power.

Prohibition against Special Laws under Article 4 Section 23

61. The Statute's retroactivity clause violates the prohibition against special laws because it impermissibly applies to only one lawsuit by a single individual.

62. According to the Department's own records, Toomey is the only person who, at the time the Statute was conceived and ultimately enacted, had ever requested access to public records regarding the State's lethal-injection drugs.

63. Section 23 states that in all cases "where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State." The Court's first inquiry is whether the retroactivity clause is a special law. *State v. Buncich*, 51 N.E.3d 136, 141 (Ind. 2016). Because the retroactivity clause applies only to one records request and will only ever apply to one request, it cannot be a general statute.

64. It does not matter that the retroactivity clause doesn't specify the request that it applies to. Whether a statute is local or general is to be determined by its application, and not by the language used. *Bumb v. Evansville*, 168 Ind. 272, 275, 80 N.E. 625, 626 (1907).

65. Law that appears to be general in form but upon investigation of subject matter is found to be local or special in substance will be declared special law by court. *In re Train Collision at Gary*, Ind. on Jan. 18, 1993, App.1995, 654 N.E.2d 1137.

66. Toomey's was the only request pending from the time she filed it to the Statute's effective date. Consequently, her request is the only one the General Assembly could have had in mind when it adopted the language that applied the law retroactively.

67. Additionally, no characteristics inherent to this lawsuit justify singling out Toomey's request. Where a law singles out a class or person for special treatment without an inherent characteristic justifying that isolated treatment, like the Statute does with Toomey, it cannot stand. This inquiry requires the Court to consider "whether there is something about the class that makes it unique and whether that uniqueness justifies the differential treatment." *Alpha Psi Chptr.*, 849 N.E.2d at 1138.

68. The only unique characteristic about Toomey is that she availed herself of the right under APRA to make a public records request. This is not an inherent trait and does not justify differential treatment from all those who did not seek records before the Statute was passed.

Single Subject Legislation under Article 4, Section 19

69. Article 4, section 19 of the Indiana Constitution, titled "Subject-matter of bills," states, "An act, except an act for the codification, revision, or rearrangement of laws, shall be confined to one subject and matters properly connected therewith." The single-subject rule directs the General Assembly to organize its acts so that there is some rational unity between the matters embraced within each individual act.

70. The single-subject rule was designed to prevent a combination of unrelated subjects in the same act. *State ex rel. Indiana Real Estate Com. v. Meier*, 244 Ind. 12, 16, 190 N.E.2d 191, 193 (1963). This is to "prevent surprise or fraud in the Legislature by means of a provision or provisions in a bill of which the title gave no information to persons

who might be subject to the legislation under consideration." *Id.* at 15, 190 N.E.2d at 193. The title must "fairly give notice of the legislative matter contained therein." *Dortch v. Lugar*, 255 Ind. 545, 551, 266 N.E.2d 25, 31 (1971).

71. When considering a potential violation of the single-subject rule, a court considers "whether the subject matter of the principal and annexed enactments are properly connected to the same single subject." *A.B. v. State*, 949 N.E.2d 1204, 1225 (Ind. 2011) (Dickson, J., concurring). Whether the General Assembly's judgment in combining the two subjects is "reasonable" is irrelevant. *Id.*
72. It is unlikely that a citizen would be able to anticipate that anything dealing with the death penalty would be included in a bill with H.B. 1001's title: "An act to amend the Indiana Code concerning state offices and administration and to make an appropriation."
73. Similarly, the Budget Bill's content gives no indication that it would include anything related to the confidentiality of drugs used for executions.

First Amendment under the United States Constitution and Article 1, Section 9 of the Indiana Constitution

74. The broad language of the Statute is overreaching and violates the First Amendment of the U.S. Constitution and article 1, section 9 of the Indiana Constitution by censoring the speech of those individuals and entities described in subsection (e), and their officers, employees and contractors and anyone else with knowledge of the identities of suppliers of execution drugs.
75. Subsection (f) makes information held by those persons—their identities and the identities of others known to them to be subject to subsection (e)—confidential, exempting it from discovery, and excluding it from evidence in any civil or criminal proceeding. I.C. § 35-38-6-1(f).

76. This confidentiality applies "to any request for information, discovery request, or proceeding, no matter when made or initiated." In turn, the Statute also violates Toomey's right to receive this information from any party willing to disclose it.

77. Article 1, section 9 of the Indiana Constitution forbids any law "restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print freely on any subject whatever…." The First Amendment to the U.S. Constitution also protects the right to speak freely as well as the right to receive information and ideas. *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972); *Lamont v. Postmaster General*, 381 U.S. 301 (1965). This protection applies to the states through the Fourteenth Amendment. *Near v. Minnesota*, 283 U.S.697, 707 (1931).

78. When a statute or court order prohibits the free flow of information and ideas, it is subject to a prior-restraint analysis.

79. The Statute is an unconstitutional prior restraint. It forbids any speaker from responding to any request for confidential identifying information, even about themselves. This applies not only to the Department but anyone, even the outsourcing facility, wholesale distributor, pharmacy, or pharmacist themselves, as well as their officers, employees, contractors, and anyone they contract with.

80. This expansive prohibition on the right to speak on a matter of public importance is forbidden by the First Amendment. *See New York Times Co. v. U.S.*, 403 U.S. 713, 714 (1971) (per curiam) (government's national security concerns did not overcome the heavy presumption against prior restraint of the press).

81. Indiana may not constitutionally suppress all speech and information sharing on matters of public importance. *Houchins v. KQED, Inc.*, 438 U.S. 1, 15 (1978) (plurality opinion). The Statute is therefore unconstitutional because it limits speech in violation of the First Amendment and Article 1, Section 9 of the Indiana Constitution. Toomey did not get to speak and respond to her pending litigation.

CONCLUSION

82. The Court has carefully reviewed everything submitted on the Department's Motion to Modify Order on Summary Judgment and to Grant Summary Judgment to DOC filed June 16, 2017.

83. Therefore, the Court DENIES the Department of Correction's Motion to Modify Summary Judgment. The Court's October 24, 2016 Ruling on Motions for Summary Judgment remains in place and is not vacated.

84. At the attorney conference held on October 23, 2018 the attorneys agreed not to appeal the decision until the Court ruled on the Plaintiff's attorney fees request. The attorneys agreed if the Court ruled in favor of the Plaintiff, then the Court would stay the Order for the Department to release information regarding the Court's Summary Judgment Order dated October 24, 2016 until the issue of attorney fees is ordered by the Court, disposing of all issues.

85. The Court stays the order for the Department to release information regarding the Court's Summary Judgment Order dated October 24, 2016 until the issue of attorney fees is ordered by the Court, disposing of all issues.

86. The Court orders a hearing on Plaintiff's attorney fee request is set on: **December 12, 2018 at 1:30 p.m. (for 1.5 hours).**

SO ORDERED this 29th day of November, 2018.

Sheryl Lynch

Sheryl Lynch, Judge
Marion Circuit Court